Supreme Court, U.S.
FILED
(1)
02 896 DEC 4 2002
OFFICE OF THE CLERK

No. 02-

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

FLUOR HANFORD, INC., AND
FLUOR FEDERAL SERVICES, INC.,

Petitioners,

v.

SCOTT BRUNDRIDGE, DONALD HODGIN, JESSIE JAYMES, CLYDE KILLEN, PEDRO NICACIO, SHANE O'LEARY, RAYMOND RICHARDSON, JAMES STULL, RANDALL WALLI, DAVID FAUBION, AND CHARLES CABLE,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Washington

---

PETITION FOR WRIT OF CERTIORARI

WILLIAM R. SQUIRES III
SUMMIT LAW GROUP
1505 Westlake Ave. N.,
Suite 300
Seattle, WA 98109
(206) 676-7054

CHRISTOPHER LANDAU
Counsel of Record
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

December 4, 2002

45 pp

QUESTIONS PRESENTED

1. Whether respondents may circumvent the exclusive jurisdiction of the National Labor Relations Board over alleged unfair labor practices by filing in state court an ostensible state-law claim for wrongful discharge in violation of state public policy.

2. Whether respondents may circumvent the arbitration clause in their collective bargaining agreement by invoking a presumption *against* arbitration under the Federal Arbitration Act.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, petitioners Fluor Federal Services, Inc., and Fluor Hanford, Inc., hereby state that they are wholly owned subsidiaries of Fluor, Inc., a publicly traded company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

OPINIONS BELOW 2

JURISDICTION 2

PERTINENT STATUTORY PROVISIONS 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 6

I. THE COURT BELOW ERRED BY HOLDING THAT RESPONDENTS' WRONGFUL DISCHARGE CLAIM IS NOT PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT 6

II. THE COURT BELOW ERRED BY APPLYING A PRESUMPTION AGAINST ENFORCEMENT OF ARBITRATION CLAUSES CONTAINED IN COLLECTIVE BARGAINING AGREEMENTS 14

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

Cases

Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc.,
199 F.3d 477 (D.C. Cir.),
vacated,
199 F.3d 487 (D.C. Cir. 1999) (*en banc*),
reinstated,
211 F.3d 1312 (D.C. Cir. 2000) (*en banc*) 17, 18

Albertson's, Inc. v. United Food & Commercial Workers Union,
157 F.3d 758 (9th Cir. 1998) 17

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974) 15-18

Amalgamated Ass'n of Street, Electric Ry. & Motor Coach Employees v. Lockridge,
403 U.S. 274 (1971) 7, 8, 11

Austin v. Owens-Brockway Glass Container, Inc.,
78 F.3d 875 (4th Cir. 1996) 16, 17

Brisentine v. Stone & Webster Eng'g Corp.,
117 F.3d 519 (11th Cir. 1997) 17, 18

Coca-Cola Bottling Co. v. Soft Drink & Brewery Workers Union Local 812,
242 F.3d 52 (2d Cir. 2001) 15

Circuit City Stores, Inc. v. Adams
532 U.S. 105 (2001) 5, 14

Department of Labor & Indus. v. Dirt & Aggregate, Inc.,
837 P.2d 1018 (Wash. 1992) 13

Farmer v. United Bhd. of Carpenters and Joiners
430 U.S. 290 (1977) 12

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 15-17

Harrison v. Eddy Potash, Inc.,
112 F.3d 1437 (10th Cir. 1997),
vacated on other grounds, 524 U.S. 947 (1998) 17

Hunter v. Earthgrains Co. Bakery,
281 F.3d 144 (4th Cir. 2002) 17

International Union, UAW v. Russell,
356 U.S. 634 (1958) 12

Inter-Modal Rail Employees Ass'n v.
Burlington N. & Santa Fe Ry. Co.,
73 Cal. App. 4th 918 (1999) 9-12

Linn v. United Plant Guard Workers,
383 U.S. 53 (1966) 12

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 14

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) 14

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 14

New York Tel. Co. v. New York Dep't of Labor,
440 U.S. 519 (1979) 13

NLRB v. City Disposal Sys. Inc.
465 U.S. 822 (1984) 8

Paige v. Henry J. Kaiser Co.,
826 F.2d 857 (9th Cir. 1987) 11, 12

Penny v. UPS,
128 F.3d 408 (6th Cir. 1997) 17

Perry v. Thomas,
482 U.S. 483 (1987) 14

Platt v. Jack Cooper Transport Co.,
959 F.2d 91 (8th Cir. 1992) 9-12

Pryner v. Tractor Supply Co.,
109 F.3d 354 (7th Cir. 1997) 17

Rodriguez de Quijas v. Shearson/American Express, Inc.,
490 U.S. 477 (1989) 14, 18

Rogers v. NYU,
220 F.3d 73 (2d Cir. 2000) (*per curiam*) 17

San Diego Bldg. Trades Council v. Garmon,
359 U.S. 236 (1959) 6-13

Sears, Roebuck & Co. v.
San Diego Cty. Dist. Council of Carpenters,
436 U.S. 180 (1978) 12

Shearson/American Express Inc. v. McMahon,
482 U.S. 220 (1987) 14

Torrez v. Consolidated Freightways Corp.,
58 Cal. App. 4th 1247 (1997) 17

UAW v. Wisconsin Employment Relations Bd.,
351 U.S. 266 (1956) 12

United Constr. Workers v. Laburnum Constr. Corp.,
347 U.S. 656 (1954) 12

Varner v. National Super Markets, Inc.,
94 F.3d 1209 (8th Cir. 1996) 17

Wisconsin Dep't of Industry, Labor &
Human Relations v. Gould,
475 U.S. 282 (1986) 7, 11

Wright v. Universal Maritime Service Corp.,
525 U.S. 70 (1998) 15, 16, 18

Youngdahl v. Rainfair, Inc.,
355 U.S. 131 (1957) 12

Statutes and Rules

9 U.S.C. § 1 14
9 U.S.C. § 2 3
28 U.S.C. § 1257(a) 2
29 U.S.C. § 151 6
29 U.S.C. § 157 3
29 U.S.C. § 158 3
29 U.S.C. § 185 ..... 5, 15
42 U.S.C. § 5851 4
Cal. Lab. Code § 1102.5 9
Cal. Lab. Code § 6310(b) 9

INTRODUCTION

This is a case about workers at a *federal* nuclear facility who are trying to circumvent an exclusive *federal* remedial scheme by pursuing an ostensible *state* claim in *state* court. Respondents are union members who were laid off from their jobs at a federal nuclear facility in Washington State. They claim that petitioners, federal contractors at the facility, wrongfully discharged them in retaliation for being (or supporting) whistleblowers on workplace-safety issues, in violation of state public policy. There is no question that respondents could have challenged their discharge by filing an unfair labor practice charge before the National Labor Relations Board, or pursuing a grievance in arbitration under their collective bargaining agreement. The question here is whether respondents can circumvent these remedies by pursuing an ostensible state-law claim in state court. Contrary to the decision below, they cannot.

The Washington Court of Appeals recognized that respondents' ostensible state-law claim was presumptively preempted by the National Labor Relations Act (NLRA), because it involves conduct at least arguably prohibited by that statute. But the court held that the claim fell within an exception to NLRA preemption for matters that "touch on interests deeply rooted in local feeling and responsibility"—even though state law does not regulate workplace safety at the federal nuclear facility, and respondents could have challenged the same conduct by filing an unfair labor practice charge with the NLRB. The court thereby allowed a narrow exception to swallow the rule, and exacerbated an existing conflict of authority on the exception's scope.

And even if respondents had a state-law claim that survived NLRA preemption, the Washington court also erred by refusing to send that claim to arbitration under the terms of the parties' collective bargaining agreement (CBA). Rather than

applying the ordinary presumption in *favor* of arbitration under the Federal Arbitration Act, the court applied a presumption *against* arbitration, holding that an arbitration clause in a CBA does not waive a judicial forum for employee claims unless the waiver is "clear and unmistakable." Once again, the court erred, and exacerbated an existing conflict of authority on the application of arbitration clauses in CBAs to employee claims.

The court below thus succeeded in flouting not one but two fundamental federal policies: (1) the policy favoring federal resolution of labor disputes, and (2) the policy favoring arbitration. Indeed, it is hard to imagine a more inappropriate context for the intrusion of state courts than a labor dispute over workplace safety at a federal nuclear facility. Because the Washington court erred, and exacerbated existing conflicts of authority on both questions presented, this Court's review is warranted.

OPINIONS BELOW

The Washington Court of Appeals' opinion is reported at 109 Wash. App. 347, 35 P.3d 389, and reprinted in the Appendix ("App.") at 1a-13a. The Washington Supreme Court's unpublished order denying the petition for discretionary review is reprinted at App. 14a-15a. The trial court's unpublished order granting petitioners' motion to dismiss in favor of arbitration and staying the proceedings pending appeal is reprinted at App. 16a-17a.

JURISDICTION

The Washington Supreme Court denied discretionary review on August 7, 2002. App. 15a. Justice O'Connor granted an extension of the time for filing this petition to and including December 4, 2002. This Court has jurisdiction under 28 U.S.C. § 1257(a).

PERTINENT STATUTORY PROVISIONS

Section 7 of the NLRA provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

29 U.S.C. § 157.

Section 8 of the NLRA provides in pertinent part:

> It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157 of this title; . . . (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter . . . .

29 U.S.C. § 158.

The Federal Arbitration Act provides in pertinent part:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

STATEMENT OF THE CASE

This case arises out of a series of layoffs at the federal nuclear facility in Hanford, Washington. Petitioners Fluor Hanford, Inc. and Fluor Federal Services, Inc. (collectively Fluor) are contractors at that facility. In that capacity, petitioners employed respondents, who are members of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local No. 598, as pipefitters. App. 3a. As union members, respondents were parties to a collective bargaining agreement (CBA) that covered every aspect of their employment at Hanford, and included (1) a guarantee that workers would not be laid off for refusing to work in unsafe conditions, and (2) a binding arbitration agreement. App. 3a.

After Fluor began working at the Hanford facility in 1996, it implemented a series of reductions in force that eliminated the jobs of 81 pipefitters, including all eleven respondents. App. 3a. Five of the respondents, however, allege that they were terminated for refusing to install an allegedly unsafe valve, and the other six allege that they were terminated for supporting the first five.

The union initially filed a grievance pursuant to the CBA protesting the layoffs of the first five workers, but then voluntarily withdrew it several months later. App. 3a. Respondents then filed complaints with the United States Department of Labor, alleging that Fluor had retaliated against them in violation of the whistleblower provisions of the Energy Reorganization Act, 42 U.S.C. § 5851, but again voluntarily withdrew those claims shortly thereafter. App. 3a-4a.

Respondents filed this lawsuit in Washington state court in August 1999, alleging that they had been terminated in violation of state public policy for being (or supporting)

whistleblowers. App. 4a.[1] Fluor removed the case to federal court as completely preempted under Section 301 of the Labor Relations Act (LMRA), 29 U.S.C. § 185. App. 4a. The district court (Shea, J., E.D. Wash.), however, held that respondents' claims were not preempted under the LMRA, and remanded to state court. App. 4a.

Back in state court, Fluor moved to dismiss respondents' claims in favor of arbitration under the CBA in light of this Court's decision in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). App. 4a-5a. The state trial court (Brown, J.) granted the motion to dismiss, but agreed to stay the proceedings pending appeal. App. 5a. Respondents appealed that decision to the Washington Court of Appeals.

The Court of Appeals reversed. App. 1a-13a. The court began by rejecting respondents' argument that the Federal Arbitration Act (FAA) does not apply at all to arbitration agreements contained in CBAs. App. 6a ("We conclude as a matter of law that the FAA is applicable to the CBA in the present case."). But the court then proceeded to apply a presumption *against* arbitration of employee claims under a CBA, holding that "an arbitration clause in a CBA will not waive an employee's right to a judicial forum unless such a waiver is *clear and unmistakable*." App. 6a (emphasis added). Applying this "clear and unmistakable" standard, the court concluded that the arbitration clause in this CBA did not specifically waive a judicial forum for employee claims of wrongful discharge in violation of state public policy. App. 6a-7a.

The court then addressed Fluor's alternative argument that dismissal of respondents' claim was warranted because that

---

[1] Respondents also brought a state-law civil conspiracy claim, but that claim was dismissed below, and respondents did not appeal that dismissal. App. 4a.

claim was preempted by the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 *et seq.* App. 10a-12a. The court acknowledged that "[u]sually the National Labor Relations Board (NLRB) is given *exclusive* jurisdiction over controversies even arguably involving unfair labor practices under the NLRA." App. 10a (emphasis added; citing, *inter alia*, *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959)). Although the court acknowledged that "we find it at least arguable that [respondents] engaged in concerted activities for mutual aid and protection in the pursuit of their claim," the court held that respondents' claims fell within an exception to *Garmon* preemption for claims that "touch[] matters of clear local interest." App. 11a. According to the court, "Washington has a substantial interest in regulating discriminatory employment practices," App. 11a, and respondents' wrongful-discharge claim implicates "Washington's interest in protecting the health and safety of its workers and citizens," App. 12a.

After concluding that respondents' claim was subject neither to the exclusive jurisdiction of the NLRB nor the arbitration agreement in the CBA, the Washington Court of Appeals reversed the trial court's ruling and "remanded for trial." App. 13a. Petitioners unsuccessfully sought discretionary review of that decision by the Washington Supreme Court. App. 14a-15a. This petition follows.

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW ERRED BY HOLDING THAT RESPONDENTS' WRONGFUL DISCHARGE CLAIM IS NOT PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT.

Since the enactment of the National Labor Relations Act (NLRA or Act), 29 U.S.C. §§ 151 *et seq.*, during the New Deal, it has been a bedrock rule of labor law that allegations of unfair

labor practices fall within the exclusive jurisdiction of the National Labor Relations Board (NLRB or Board). The Act's "comprehensive regulation of industrial relations by Congress" reflects "the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 239, 242 (1959). By granting the Board exclusive jurisdiction over alleged unfair labor practices, Congress specifically intended to preclude state law and state courts from regulating the conduct involved. *See id.* at 244-45. Thus, "[w]hen an activity is *arguably* subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Id.* at 245 (emphasis added). "[C]ourts are not primary tribunals to adjudicate . . . issues" such as "whether the particular activity regulated by the States [is] governed by § 7 or § 8 or [is], perhaps, outside both these sections"; rather, "[i]t is essential to the administration of the [NLRA] that these determinations be left in the first instance to the National Labor Relations Board." *Id.* at 244-45; *see also Wisconsin Dep't of Industry, Labor & Human Relations v. Gould*, 475 U.S. 282, 286 (1986); *Amalgamated Ass'n of Street, Electric Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 286-91 (1971). Indeed, *Garmon* preemption applies even where (as in *Garmon* itself) the Board has *declined* to exercise its regulatory authority over the conduct in question. 359 U.S. at 245-46.

The *Garmon* rule, to be sure, is not without its exceptions. In particular, courts may apply state law to conduct arguably protected or prohibited by the NLRA where (1) "the regulated conduct touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the

States of the power to act," or (2) "the activity regulated [is] a merely peripheral concern" of the Act. *Garmon*, 359 U.S. at 243-44. These exceptions, however, are narrow, and in no way undermine "the broad preemption principle enunciated in *Garmon*." *Lockridge*, 403 U.S. at 284.

The Washington Court of Appeals recognized (as it could hardly avoid doing) that the conduct challenged by respondents (their discharge for allegedly being or supporting whistleblowers on workplace-safety issues) was at least "arguably" within the scope of the NLRA, and thus presumptively preempted under *Garmon*. App. 10a-11a. As the Washington court explained, "we find it at least arguable that the pipe fitters engaged in concerted activities for mutual aid and protection in the pursuit of their claim." *Id.* at 11a.[2]

Notwithstanding that conclusion, the court held that respondents' claim escaped *Garmon* preemption under the exception for "matters of clear local interest." App. 11a. According to the court, "Washington has a substantial interest in regulating discriminatory employment practices," *id.*, and respondents' wrongful-discharge claim implicates "Washington's interest in protecting the health and safety of its workers and citizens," *id.* at 12a; *see also id.* ("Fluor's alleged conduct in terminating employees for refusing to install unsafe valves in a nuclear waste facility, and in terminating employees who supported those who refused to install the valves, clearly touches on interests deeply rooted in local feeling and

---

[2] Respondents themselves acknowledged below that "their activities may be characterized as 'concerted activities' under the NLRA, which would normally give rise to disputes being resolved by the NLRB under *Garmon*," and that their opposition to *Garmon* preemption thus hinged solely on the "local interest" exception. Answer to Pet'r's Pet. for Review by the Supreme Court (3/6/02), at 17 n.6; *cf. NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822 (1984) (discharge of employee who refused to drive allegedly unsafe truck fell within NLRB's jurisdiction).

responsibility.") (citing *Inter-Modal Rail Employees Ass'n v. Burlington N. & Santa Fe Ry. Co.*, 73 Cal. App. 4th 918 (1999)).

By holding that respondents' claim escaped *Garmon* preemption under the "local interest" exception, the Washington court erred, and exacerbated an existing conflict in authority over the scope of that exception specifically as applied to claims of wrongful discharge in violation of state public policy by workers claiming to be whistleblowers on workplace-safety issues. As the Eighth Circuit explained in *Platt v. Jack Cooper Transport Co.*, 959 F.2d 91 (8th Cir. 1992), such claims are preempted by the NLRA notwithstanding a State's general interest in promoting workplace safety.

The *Platt* case, like this one, involved a unionized worker who brought a state-law claim alleging wrongful discharge in retaliation for complaining about workplace safety. In sharp contrast to the court below, the Eighth Circuit held the claim preempted by the NLRA, and specifically rejected the application of the "local interest" exception. *Id.* at 94-95. In doing so, the court did not gainsay the local interest in protecting whistleblowers who raise concerns about workplace safety. *See id.* at 95 ("[W]e have no doubt that California, like the federal government, has a strong interest in protecting workers who make job safety complaints, an interest reflected in Cal. Lab. Code § 1102.5, a 'whistleblower' statute, and in Cal. Lab. Code § 6310(b), which prohibits the discharge of employees who make safety related complaints."). As the court explained, however, that interest did not require vindication under state law because the plaintiff "could have brought to the NLRB the specific claim asserted in this lawsuit—that he was fired for making job safety complaints." 959 F.2d at 95. The *Platt* court also emphasized that, in a wrongful-discharge case, "both the retaliatory misconduct

alleged and the remedy sought are directly relevant to the Board's central function, unlike the cases in which a local interest exception has been recognized." *Id.* Precisely the same is true here: the alleged wrongful discharge of unionized workers for being, or supporting, whistleblowers on workplace-safety issues falls squarely within the Board's central function, and respondents could have challenged their discharge by filing an unfair labor practice claim before the Board. What they cannot do is to circumvent the Board's exclusive jurisdiction over such conduct by simply asserting that their claims involve "local interests."

Platt's interpretation of the scope of *Garmon* preemption, however, is not universal. In *Inter-Modal Rail Employees Ass'n v. Burlington N. & Santa Fe Ry. Co.*, 73 Cal. App. 4th 918 (1999)—a case on which the court below expressly relied, *see* App. 11a-12a—the California Court of Appeal "ch[ose] not to follow *Platt*," and held (like the court below) that a state-law claim of wrongful discharge in violation of state public policy survived *Garmon* preemption under the "local interest" exception. *Id.* at 924-28. In *Inter-Modal* (as here and in *Platt*), the plaintiff contended that unionized workers had been wrongfully discharged in retaliation for complaining about workplace safety. According to the *Inter-Modal* court, "the employer's alleged conduct in terminating the plaintiff for . . . refusing to endanger the health and safety of California workers, is clearly conduct which *touches interests deeply rooted in local feeling and responsibility*." *Id.* at 925 (internal quotation and brackets omitted; emphasis in original). The court specifically rejected *Platt*'s conclusion that a wrongful discharge claim by an alleged workplace-safety whistleblower is preempted because "the controversy presented to the state court is identical to . . . that which could have been . . . presented to the Labor Board." *Id.* at 927 (internal quotation omitted).

The Ninth Circuit has gone even further than the California Court of Appeal, holding that *Garmon* preemption analysis is simply "not relevant" to a state-law wrongful-discharge claim. *See Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 862 (9th Cir. 1987). In *Paige* (as here, *Platt*, and *Inter-Modal*) the plaintiffs were unionized workers who alleged that they had been wrongfully discharged in retaliation for complaining about workplace safety. The Ninth Circuit rejected a *Garmon* preemption defense based on the truism that the plaintiffs' ostensible state-law claim did not arise under the NLRA. *See id.* The court asserted that the plaintiffs, "as masters of their complaint, did not allege a violation of their rights under the NLRA, but only violations of state statutes and policy. By foregoing their claim based on federal law, the [plaintiffs] may choose to plead their action as a state claim," and thus avoid *Garmon* preemption. *Id.*

The Ninth Circuit's *Paige* analysis makes no sense: the whole point of the *Garmon* doctrine is to determine when ostensible state-law claims are preempted by the NLRA. If the fact that a claim is framed under state law were enough to survive *Garmon* preemption, the doctrine would be a dead letter. What matters is the *conduct* challenged by the claim, not the *label* placed on the claim. *See, e.g., Gould*, 475 U.S. at 289 ("'It is the *conduct* being regulated, not the formal description of governing legal standards, that is the proper focus of concern.'") (emphasis added; quoting *Lockridge*, 403 U.S. at 292); *Gould*, 475 U.S. at 287 ("'[J]udicial concern has necessarily focused on the nature of the *activities* which the States have sought to regulate, rather than on the method of regulation adopted.'") (emphasis added; quoting *Garmon*, 359 U.S. at 243). Not surprisingly, thus, the *Platt* court expressly rejected the *Paige* court's holding on this score. *See* 959 F.2d at 95 n.7 ("[T]o the extent *Paige* holds that plaintiffs may avoid *Garmon* preemption simply by choosing 'to plead their action

as a state claim,'"—which it manifestly does—"we disagree.") (quoting *Paige*, 826 F.2d at 862).

The decision below, *Inter-Modal*, and *Paige* all reflect an unduly narrow scope of *Garmon* preemption. Respondents' ostensible state-law wrongful-discharge claim is nothing more than an "artfully pleaded" unfair labor practice charge. If the "local interest" exception were sufficient to save such a claim from preemption, then the exception would swallow the rule: *every* state-law claim can be said to involve matters of "local interest," because state-law claims by definition implicate some state policy or interest. It is telling that the four cases cited by *Garmon* in support of the "local interest" exception, *see* 359 U.S. at 244 n.2 (citing *International Union, UAW v. Russell*, 356 U.S. 634 (1958); *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957); *UAW v. Wisconsin Employment Relations Bd.*, 351 U.S. 266 (1956), and *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954)), as well as this Court's subsequent cases applying that exception, *see Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters*, 436 U.S. 180, 195 (1978); *Farmer v. United Bhd. of Carpenters & Joiners*, 430 U.S. 290 (1977); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), all involve state laws of general applicability. Although the narrow "local interest" exception may allow States to apply some general laws in the employment context, *see e.g., Sears*, 436 U.S. at 195 (trespass); *Farmer*, 430 U.S. at 296-97, 299-300 (intentional infliction of emotional distress); *Linn*, 383 U.S. at 61-62 (libel); *Russell*, 356 U.S. at 640 (violence); *Youngdahl*, 355 U.S. at 138 (violence); *Wisconsin*, 351 U.S. at 272-75 (violence); *Laburnum*, 347 U.S. at 665-66 (threats of violence), it does not allow States to apply laws (like a wrongful-discharge claim) directed *specifically and exclusively* at that context. The court below thus erred by invoking Washington's alleged "substantial interest in regulating discriminatory employment practices," App. 11a, to avoid *Garmon* preemption. "[I]t is

essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself." *Farmer*, 430 U.S. at 300, 305 (emphasis added).

Indeed, the Washington court's invocation of the "local interest" exception here is particularly outlandish, as respondents are challenging their discharge from a *federal nuclear facility* where the State's occupational health and safety laws *do not even apply*. *See, e.g., Department of Labor & Indus. v. Dirt & Aggregate, Inc.*, 837 P.2d 1018, 1023 (Wash. 1992). "[A]s the cases make clear, the Court has not extended [the "local interest"] exception beyond a limited number of state interests that are at the *core* of the States' duties and traditional concerns." *New York Tel. Co. v. New York Dep't of Labor*, 440 U.S. 519, 550-51 (1979) (opinion concurring in the judgment) (citing cases; emphasis added). It goes without saying that a State cannot claim a compelling interest in protecting alleged whistleblowers on workplace-safety issues in a federal enclave where the State's own workplace-safety laws do not even apply.

Because respondents' ostensible state-law wrongful-discharge claim is preempted by *Garmon*, they are not entitled to pursue such a claim, and their only remedy for the challenged conduct is to file an unfair labor practice charge with the NLRB. The Washington Court of Appeals thus erred by allowing them to proceed with their claim, and thereby exacerbated an existing conflict of authority over the scope of *Garmon* preemption in this context.

II. THE COURT BELOW ERRED BY APPLYING A PRESUMPTION AGAINST ENFORCEMENT OF ARBITRATION CLAUSES CONTAINED IN COLLECTIVE BARGAINING AGREEMENTS.

Even if respondents had a state-law claim that survived *Garmon* preemption, the Washington Court of Appeals further erred by holding that respondents were entitled to pursue that claim in court, rather than in arbitration pursuant to the "exclusive grievance procedure" set forth in their collective bargaining agreement. The court did not deny that the arbitration agreement, if construed in light of the traditional presumption in *favor* of arbitration under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, would require arbitration of respondents' claims. Instead, the court applied a presumption *against* arbitration in this context, holding that "an arbitration clause in a CBA will not waive an employee's right to a judicial forum unless such a waiver is *clear and unmistakable*." App. 6a (emphasis added).

The Washington court thereby turned the law on its head. It is axiomatic that the FAA creates a strong presumption in *favor* of, not *against*, arbitration. *See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480-81 (1989); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Perry v. Thomas*, 482 U.S. 483, 489 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). And there is no question now that arbitration clauses contained in CBAs, except to the limited extent those agreements cover transportation workers, are governed by the FAA. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-19 (2001).

The court below purported to base its application of the FAA on this Court's decision in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), but that reliance was misplaced. *Wright* did not involve the FAA at all; to the contrary, the Court expressly *declined* to consider the applicability of the FAA because neither the parties nor the lower court had addressed that issue. *See id.* at 77 n.1. Contrary to the Washington court's assertion, *Wright* held only that the presumption in favor of arbitration under the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185, does not apply to workers' federal statutory claims, because that presumption is based on the principle "that arbitrators are in a better position than courts *to interpret the terms of a CBA*." 525 U.S. at 78 (emphasis in original). Because federal statutory claims do not involve the interpretation of a CBA, the Court held, the LMRA's presumption of arbitration does not apply in this context. *See id.* That reasoning, however, has no application to the FAA, which imposes a presumption in favor of enforcement of arbitration agreements *whatever* their subject matter, and which trumps any contrary state law or policy. *Cf. Coca-Cola Bottling Co. v. Soft Drink & Brewery Workers Union Local 812*, 242 F.3d 52, 54 (2d Cir. 2001) (noting that the LMRA is "analytically distinct from the FAA"). Needless to say, *Wright* cannot be deemed conclusive authority on the enforceability of arbitration clauses in CBAs in cases (like this one) governed by the FAA—an issue that *Wright* expressly declined to address.

Indeed, the lower courts are in open disarray on the very issue presented here: whether, and under what circumstances, an arbitration clause in a CBA can be deemed to waive an employee's right to a judicial forum for individual employment-related claims. That confusion stems primarily from the interplay between two of this Court's decisions: *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

Gardner-Denver reflects an outmoded judicial antipathy toward arbitration (characterizing it as inferior to the judicial process for resolving statutory claims, *see* 415 U.S. at 57-58), and states that a union cannot bind its members to arbitration of their individual claims in a CBA, *see id.* at 51 ("[T]here can be no prospective waiver of an employee's [statutory] rights," including the right to a judicial forum, in a CBA). *Gilmer*, in contrast, reflects the "current strong endorsement" of arbitration even of individual employment-related claims, and specifically disavows *Gardner-Denver*'s antipathy toward arbitration. 500 U.S. at 30 (internal quotation omitted), 34 n.5. Because the arbitration clause in *Gilmer* was not contained in a CBA, however, that case did not specifically address the ongoing vitality of *Gardner-Denver* in that context. *See id.* at 35.

The question thus remains (as this Court noted, but expressly declined to answer, in *Wright*) "whether or not *Gardner-Denver*'s seemingly absolute prohibition of union waiver of employees' federal forum rights survives *Gilmer*." 525 U.S. at 80. The lower courts are clearly and expressly divided on this question. The Fourth Circuit has held that *Gilmer* effectively overruled *Gardner-Denver*, and that arbitration clauses in CBAs presumptively waive employees' right to a judicial forum just like arbitration clauses in other binding employment-related agreements. *See Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 885 (4th Cir. 1996) ("Whether the dispute arises under a contract of employment growing out of a securities registration application, a simple employment contract, *or a collective bargaining agreement*, an agreement has yet been made to arbitrate the dispute.") (emphasis added). Eight other federal courts of appeals disagree, and hold that even after *Gilmer*, an arbitration clause in a collective bargaining agreement is either *per se* unenforceable, or (as the court below held) subject to a presumption *against* arbitration of individual employee claims.

See Rogers v. NYU, 220 F.3d 73, 75-77 (2d Cir. 2000) (*per curiam*); *Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc.*, 199 F.3d 477, 481-86 (D.C. Cir.), *vacated*, 199 F.3d 487 (D.C. Cir. 1999) (*en banc*), *reinstated*, 211 F.3d 1312 (D.C. Cir. 2000) (*en banc*); *Albertson's, Inc. v. United Food & Commercial Workers Union*, 157 F.3d 758, 761-62 (9th Cir. 1998); *Penny v. UPS*, 128 F.3d 408, 413-14 (6th Cir. 1997); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 526-27 (11th Cir. 1997); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1453-54 (10th Cir. 1997), *vacated on other grounds*, 524 U.S. 947 (1998); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 360-65 (7th Cir. 1997); *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996); *see also Torrez v. Consolidated Freightways Corp.*, 58 Cal. App. 4th 1247, 1249-60 (1997). These decisions "disagree with the result and reasoning of the Fourth Circuit" in *Austin*, *Brisentine*, 117 F.3d at 526, and acknowledge the clear "circuit split" on this issue, *Pryner*, 109 F.3d at 363; *see also Rogers*, 220 F.3d at 75 & n.1; *Air Line Pilots*, 199 F.3d at 484; *Albertson's*, 157 F.3d at 761-62; *Penny*, 128 F.3d at 413; *Harrison*, 112 F.3d at 1453; *Torrez*, 58 Cal. App. 4th at 1249-50 & n.1, 1257-59; *cf. Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 154 (4th Cir. 2002).

The court below exacerbated this circuit split by applying a presumption against arbitration of respondents' ostensible state-law claim here, even though respondents (as union members) are unquestionably bound by a CBA (negotiated by their union representatives) with an arbitration clause. That presumption is impossible to square with the FAA, which commands precisely the opposite presumption. And there is no reason to apply a presumption against arbitration but for *Gardner-Denver*'s outmoded antipathy toward arbitration. Under the Fourth Circuit's analysis in *Austin*, which recognized that unions have the power to waive individual employee rights in CBAs and did not employ any presumption

against such waiver, respondents' claims are plainly subject to arbitration.

Indeed, even those decisions that disagree with *Austin* do not necessarily endorse the notion that arbitration clauses in CBAs should be construed differently than such clauses in all other agreements. Rather, a number of those decisions simply hold that they are constrained by *Gardner-Denver*, and emphasize that it is up to this Court, not a lower court, to repudiate that decision. *See Air Line Pilots*, 199 F.3d at 484 ("We . . . leave to the Court itself the prerogative of overruling its own precedent (if it will); we apply the law as it stands.") (citing *Rodriguez*, 490 U.S. at 484); *Brisentine*, 117 F.3d at 525 ("It may be that the Supreme Court has cut [*Gardner-Denver*] back so far that it will not survive. Perhaps, but we are not convinced we are authorized to sing the dirge of [*Gardner-Denver*]. We will leave that to the Supreme Court.") (also citing *Rodriguez*, 490 U.S. at 484). That is hardly a ringing endorsement of *Gardner-Denver* over *Gilmer*; to the contrary, it is an invitation for this Court to clarify the "obviou[s] . . . tension" between those two precedents. *Wright*, 525 U.S. at 76; *see also Air Line Pilots*, 199 F.3d at 483.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

WILLIAM R. SQUIRES III
SUMMIT LAW GROUP
1505 Westlake Ave. N.,
Suite 300
Seattle, WA 98109
(206) 676-7054

CHRISTOPHER LANDAU
Counsel of Record
KIRKLAND & ELLIS
655 Fifteenth St., N.W.
Washington, D.C. 20005
(202) 879-5000